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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1060

FORTH CORPORATION AND
LEE LEMAY, ADMINISTRATOR OF THE ESTATE
OF ROBERT W. CAREY, DECEASED,
Petitioners,

vs.

ALLEGHENY AIRLINES, INC. AND
UNITED STATES OF AMERICA,
Respondents.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on September 20, 1974.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit, Cause Nos. 73-1392 and 73-1393, is reported in 504 F.2d 400. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 20, 1974. A copy of that judgment is attached hereto as Appendix B. A joint peti-

tion for rehearing was denied by the Court of Appeals on November 26, 1974. A copy of the order denying the petition is attached hereto as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that a federal common law rule should be applied in diversity cases to claims for contribution and indemnity arising out of aviation accidents?

2. When the United States is sued under the Federal Tort Claims Act for damages arising out of an aviation accident, should its claims for contribution and indemnity be governed by federal common law or state law?

3. If a federal common law rule is created to apply to claims for contribution and indemnity in aviation cases, should that rule permit contribution or indemnity and, if so, on what basis?

4. Whether the District Court correctly dismissed the claims for contribution and indemnity by Allegheny and the United States for failure to state a claim upon which relief could be granted under Indiana law.

STATUTES INVOLVED

The federal statutes involved are 28 U.S.C. § 1346(b), 49 U.S.C. § 1506 and § 1508(a). The legislative acts of the Indiana legislature involved are Ind. Ann. Stat. Code §§ 8-21-4-5 and 8-21-4-6 (Burns 1973). These statutes are set forth in Appendix D.

STATEMENT OF THE CASE

Factual Background

This case arises out of a mid-air collision which occurred on September 9, 1969, in the airspace over Fairland, Indi-

ana, between an Allegheny Airlines DC-9 jet aircraft and a Piper Cherokee aircraft being flown by Robert Carey. The Piper Cherokee was owned by Forth Corporation, a wholly owned subsidiary of Brookside Corporation. All occupants of both aircraft were killed in the accident.

At the time of the mid-air collision, the Allegheny DC-9 was being operated under an instrument flight rules clearance from Cincinnati, Ohio to Indianapolis, Indiana and was receiving air traffic control directions from the Federal Aviation Administration facilities located at Weir Cook Airport in Indianapolis. The Piper Cherokee aircraft was being operated under visual flight rules on a cross-country flight from Brookside Airport, McCordsville, Indiana, to Bakalar Air Force Base, Columbus, Indiana.

After the accident, personal representatives of all persons killed in the accident, except one passenger and one Allegheny crewmember, commenced wrongful death actions in the federal court system. Jurisdiction in suits against Allegheny, Brookside, Forth and the estate of Carey were based upon diversity of citizenship. Suits against the United States were brought under the Federal Tort Claims Act. In addition, property damage suits were commenced in federal court to recover damages for the destruction of the two aircraft. Some of the wrongful death actions were commenced in Indiana while some were commenced in other states. The Judicial Panel on Multidistrict Litigation assumed jurisdiction over those actions commenced outside Indiana and pursuant to 28 U.S.C. § 1407 transferred them to the United States District Court for the Southern District of Indiana to supervise pre-trial discovery proceedings. *In re Mid-Air Collision Near Fairland, Indiana,* 309 F.Supp. 621 (JPML 1970).

Proceedings In The District Court

After all cases had been transferred to Indiana under § 1407, extensive discovery proceedings were undertaken

by all parties involved. Eventually the District Court ordered all cases transferred to the Southern District of Indiana for trial pursuant to 28 U.S.C. § 1404 (A. 257-270, 277-298, 305-310). Thereafter, one group of the passenger wrongful death cases was assigned for trial on February 22, 1972.

By the time of trial Allegheny and the United States had filed either cross-claims or third-party complaints against Brookside, Forth and the estate of Carey seeking contribution and indemnity. The District Court severed the cross-claims and third-party complaints from the issues to be considered at the February trial and deferred resolution of all claims for contribution and indemnity until a future date (A. 262).

Shortly after the February trial commenced, the United States and the insurers of Allegheny reached agreement on a pro-rata formula to be utilized between them in disposing of all wrongful death claims, whether by settlement or judgment (A. 471-472). Brookside, Forth and the estate of Carey were not parties to this agreement. A compromise was reached between the plaintiffs in the February trial and Allegheny and the United States and the trial was then terminated. Thereafter, Allegheny's insurers and the United States proceeded to settle the remaining wrongful death cases.

After all of the wrongful death claims had been settled, the District Court dismissed all cross-claims and third-party complaints by Allegheny and the United States for contribution and indemnity against Forth and the estate of Carey for failure to state a claim upon which relief could be granted by application of Indiana law (A. 448-449). In addition, the District Court granted summary judgment on the defenses of Forth and the estate of Carey to those claims on the grounds that the settlements paid by Allegheny and the United States constituted an accord and

satisfaction and were voluntary payments (A. 452-456). The claims by Allegheny and the United States against Brookside for contribution and indemnity were dismissed on the basis of the District Court's ruling that Brookside could not be held liable for the torts of its subsidiary Forth.

Proceedings In The Court of Appeals

Allegheny and the United States both appealed from the dismissal of their claims for contribution and indemnity against Brookside, Forth and the estate of Carey. The Court of Appeals affirmed the dismissal of the claims as to Brookside, but reversed the decision of the District Court with respect to the dismissal of the claims against Forth and the estate of Carey. It held there should be a federal law of contribution and indemnity governing mid-air collisions such as the one in this case. The basis for its holding was what the Court perceived to be the predominant interest of the federal government in regulating the nation's airways and the desirability of eliminating inconsistent results due to the application of different state laws on contribution and indemnity.

In support of its conclusion that there should be federal preemption of aviation tort litigation, the Court relied on the Federal Aviation Act, the fact that the United States was a party to the action and that pre-trial discovery had been subject to the supervision of the Judicial Panel on Multidistrict Litigation. The Court did note that it felt the Federal Tort Claims Act, which requires application of state law to claims against the United States, would not be an obstacle to the application of federal common law to the claim for contribution and indemnity made by the United States. The Court did not comment on the fact that the United States had conceded in its brief that Indiana law was applicable to its claims (U.S. Brief p. 5, Nos. 73-1392 and 73-1393).

Having concluded that a federal common law rule of in-

demnity and contribution should be fashioned to apply in aviation cases, the Court then stated it considered the better rule to be one permitting contribution and indemnity on a comparative negligence basis.

The Court disagreed with the contentions of Forth and the estate of Carey that the settlements paid by Allegheny and the United States were voluntary payments. It said that the voluntary nature of the settlement would simply be a factor to be taken into consideration by the trier of fact as to whether the settlements were reasonable in amount.

The case was heard before a three judge panel consisting of Chief Judge Luther M. Swygert, Circuit Judge Roger J. Kiley and Senior District Judge Julius J. Hoffman. Judge Kiley heard oral argument in the case, but died before he considered the Court's opinion. A joint petition for a rehearing *in banc* was filed by Forth and the estate of Carey. The petition was denied on November 26, 1974, with three of the seven active members of the court voting to grant the petition for rehearing *in banc.*

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT BELOW TO APPLY A FEDERAL COMMON LAW RULE IN AN AVIATION TORT CASE IN WHICH FEDERAL JURISDICTION IS BASED UPON DIVERSITY OF CITIZENSHIP AND THE FEDERAL TORT CLAIMS ACT IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL AND OF THIS COURT.

With regard to aviation accident litigation, the opinion of the Court of Appeals for the Seventh Circuit is the most significant and far-reaching case since *Erie Railroad Co.* v.

Tompkins, 304 U.S. 64 (1938). The decision of the Court below to apply a federal common law rule for contribution and indemnity in this case is unprecedented and completely without foundation under existing statutory or decisional law.

The decision conflicts with two basic legal principals established by this Court and which have been applied consistently by other Courts of Appeal. By preempting state law and fashioning a federal law of contribution and indemnity the Court below has completely ignored the *Erie* doctrine which requires that state substantive law be applied in diversity cases. Secondly, the decision conflicts with the principle that claims by the United States for contribution and indemnity arising in suits brought under the Federal Tort Claims Act are also governed by state law. *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951).

The *Erie* doctrine is so well established that few courts have discussed its applicability. Customarily other Courts of Appeal have applied state substantive law in aviation tort litigation without comment where federal jurisdiction has been based on diversity of citizenship. The Court of Appeals for the Ninth Circuit applied the state law of Nevada in an aviation case to claims for contribution and indemnity between the airline involved and the United States. *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir. 1964). Under similar circumstances, the Court of Appeals for the Second Circuit applied the state law of New York to resolve claims for contribution and indemnity between an airline and the United States. *Ingham* v. *Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir. 1967). In other aviation cases not involving the specific issue of contribution and indemnity state substantive law has also been applied. *Lobel* v. *American Air Lines, Inc.*, 192 F.2d 217 (2d Cir. 1951); *Gatenby* v. *Altoona Aviation Corporation*, 407 F.2d 443 (3rd Cir. 1968).

The decision of the Court below also presents a decided conflict with the decisions of other Courts of Appeal with regard to its holding that federal law should govern the claim of the United States. When the United States has been sued under the Federal Tort Claims Act, its claims for contribution and indemnity have consistently been governed by state substantive law. *O'Neill* v. *United States*, 450 F.2d 1012 (3rd Cir. 1971); *United States* v. *State of Arizona*, 214 F.2d 389 (9th Cir. 1954); *Morris* v. *Uhl & Lopez Engineers, Inc.*, 442 F.2d 1247 (10th Cir. 1971).

The Court below was persuaded to apply a federal common law rule in this case by what it perceived to be the predominant interests of the federal government in regulating the affairs of the nation's airways. In so doing, the Court relied on what it considered to be the intent of Congress as expressed in the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301, et seq. and in particular section 1108 of the Act, 49 U.S.C. § 1508(a). However, the Court failed to note that the Act expressly provides in 49 U.S.C. § 1506 that none of the provisions of the Act "shall abridge or alter the remedies now existing at common law or by statute." Nor did the Court consider opinions by the Courts of Appeal for the Fifth Circuit and the Tenth Circuit which have expressly rejected the claim that the Federal Aviation Act preempts state law with regard to aviation tort litigation.

In *Rogers* v. *Ray Gardner Flying Service, Inc.*, 435 F.2d 1389 (5th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971), the Court of Appeals for the Fifth Circuit expressly rejected a claim that the Federal Aviation Act granted a right of action in tort under the facts of that particular case and applied state substantive law. In rejecting the federal preemption argument, the Court observed that the Act made no provision for its application to tort liability and in fact expressly provided that existing common law or statutory

remedies should not be abridged or altered by anything contained in the Act. The Court further said that if Congress had intended to alter existing tort law, which has historically been left to the states, it would have done so in a more direct fashion.

In a similar case, the Court of Appeals for the Tenth Circuit in *McCord* v. *Dixie Aviation Corporation,* 450 F.2d 1129 (10th Cir. 1971), also rejected the argument that the Federal Aviation Act was intended to preempt state tort laws. The Court could find no compelling federal interests which would justify the creation and application of a federal common law rule and that to do so would constitute abusive judicial law-making. It said that the arguments for federal preemption should be directed to the lawmaking power of Congress and not to the adjudicative power of the courts.

The unique view of the Court below that federal common law should be applied in aviation cases, at least as to claims for contribution and indemnity, clearly conflicts with the foregoing decisions of other Courts of Appeal. Furthermore, it is readily apparent from the Court's opinion that the rule of federal preemption will not be limited to claims for contribution and indemnity, but will be applied to all issues arising in aviation cases. As a result of this decision, one may reasonably expect federal common law to be applied in aviation accident cases arising in the Seventh Circuit, including claims for contribution and indemnity, while state substantive law will be applied in other Courts of Appeal.

This present conflict of whether to apply federal or state law in aviation cases must be resolved by this Court.

II.

BY CREATING AND APPLYING A FEDERAL RULE OF CONTRIBUTION AND INDEMNITY IN AVIA-

TION CASES, THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN DIRECTLY SETTLED BY THIS COURT, BUT IS IN CONFLICT WITH PRINCIPLES ANNOUNCED IN PRIOR DECISIONS OF THIS COURT.

The Court of Appeals decided in this case that a federal common law rule should be applied because of what it considered to be the predominant interest of the federal government in regulating the affairs of the nation's airways and for the purpose of eliminating inconsistent results in similar aviation accidents occurring in states which may have differing substantive laws.

While uniform results in aviation litigation arising anywhere in the United States may arguably be desirable, it is an extremely broad innovation which should more properly be instituted by Congress and not by the courts. In *Executive Jet Aviation* v. *Cleveland,* 409 U.S. 249 (1972), the petitioner urged that federal admiralty law should apply in that particular case, arguing that aviation tort cases should be governed by uniform substantive and procedural laws, and that by invoking admiralty jurisdiction such actions could be heard in federal courts to avoid divergent results and duplicitous litigation in multi-party cases. This Court rejected the argument for uniformity and stated:

> "If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce." 409 U.S. at 274.

Uniformity of results may be desirable in this type of litigation, but Congress alone should determine whether

the legitimate interests of the various states concerning aviation accidents occurring within their jurisdiction should be preempted by universally applied federal law. The highly specialized and technical nature of modern aviation requires that any regulation of that activity must be carefully adapted to its specific needs. Resolution of these matters involves a careful balancing of technical and public policy considerations which is a proper function for the legislative branch of government, not the judicial.

Congress has exercised its power under the Commerce Clause to control aviation by the enactment of the Federal Aviation Act, 49 U.S.C. §§ 1301, et seq. in which it declared complete national sovereignty in the air space above the United States. 49 U.S.C. § 1508(a). However, the objective of that Act, as evidenced by the Act itself and the regulations issued thereunder by the Federal Aviation Administration, is to control the movement of air traffic and to provide for the certification of aircraft and airmen. The Act makes no provision for any tort litigation arising out of aviation accidents, and in fact, expressly states that nothing contained in the Act "shall in any way abridge or alter the remedies now existing at common law or by statute . . ." 49 U.S.C. § 1506. Even though Congress has exercised its power under the Commerce Clause to regulate aircraft in flight, clearly it intended to retain the status quo between federal and state law regarding remedies available to litigants in aviation cases. Much as this Court observed in *Executive Jet,* Congress could have enacted a federal law of contribution and indemnity to apply in aviation cases, but it chose not to do so. In the absence of any intent by Congress to federally preempt aviation tort litigation, and in view of its express requirement that existing common law or state statutory remedies should not be altered by the Federal Aviation Act, state substantive law presently controls aviation tort litigation.

The Court of Appeals also considered the presence of the United States in this case as a factor favoring imposition of a federal law. It did so even though the United States conceded that the state law of Indiana should control its claims for contribution and indemnity against the petitioners. The Court said it considered the Federal Tort Claims Act as being no obstacle to the imposition of federal common law.

Jurisdiction over the United States in this case was obtained pursuant to the Federal Tort Claims Act which expressly provides that liability of the United States is to be determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Under this provision of the Tort Claims Act state law must be applied to claims asserted against the United States. If petitioners had asserted claims for contribution and indemnity against the United States, then clearly Indiana law would have been applied to resolve those claims because the alleged acts and omissions of negligence on behalf of the United States all occurred within that state. Certainly it seems fair that the same law should be applied to claims by the United States against the petitioners. Whether federal or state substantive law is applied to the claim should not be determined by which party is asserting the claim.

This principle was recognized by this Court in *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951). Furthermore, this Court has also applied state substantive law in aviation cases brought pursuant to the Federal Tort Claims Act. In *Richards* v. *United States,* 369 U.S. 1, (1962) personal representatives of airline passengers killed in an airline crash brought wrongful death actions against the United States under the Federal Tort Claims Act. This Court was called upon to decide a conflict of laws question concerning the applicability of either Missouri or Oklahoma law. In resolving that question, this Court said that the

federal courts, in multi-state tort actions, are required to look to the law of the place where the negligence occurred. This Court did not attempt to fashion a federal common law, but instead followed the requirements of the Federal Tort Claims Act as enacted by Congress and applied state law. This Court also observed that a suit against the airline involved would be governed by state law.

Contrary to the reasoning of the Court below, the presence of the United States as a party to the litigation does not favor the application of federal common law. Because of the requirements of the Federal Tort Claims Act, the presence of the United States mandates application of state substantive law.

Also, the Court of Appeals considered the fact that this litigation was subject to supervision by the Judicial Panel created by the Multi-District Litigation Act, 28 U.S.C. § 1407 as favoring application of a federal law. But that Act has no relevance to the application of federal substantive law. The Act pertains only to the consolidation of claims for pre-trial discovery proceedings. Its impact is procedural, not substantive.

The federal interests involved in this litigation are minimal. While it is true the federal government has an interest in the management and control of aircraft moving through the national airspace, this federal interest has no relevance to the outcome of litigation brought against the Indiana petitioners for contribution and indemnity arising out of settlements paid as a result of an aircraft accident. Indiana has a far more compelling interest in the rights and liabilities of its citizens. By fashioning and applying federal common law in this case, the Court below has entirely subverted these legitimate state interests.

The Court below has completely ignored the role of Congress in these matters by imposing federal preemption in

aviation cases and by constructing a specific federal rule permitting contribution on a comparative negligence basis. As a result, this Court is now presented with an exceptional opportunity to resolve an important question of federal law which affects the entire field of aviation litigation.

III.

THE DECISION OF THE COURT OF APPEALS IS DIRECTLY IN CONFLICT WITH THE APPLICABLE LAW OF THE STATE OF INDIANA.

The Court below has ignored the applicable statutory and decisional law of the State of Indiana and has rendered an opinion which is totally in conflict with the laws of that state.

The Indiana legislature has clearly expressed its intention that aviation accidents occurring in that state shall be governed by the laws of Indiana. The legislature provided in Ind. Ann. Stat. Code § 8-21-4-5 (Burns 1973) that liability arising out of an aviation accident, such as the one in this case, shall be determined by the rules of law applicable to torts occurring on land. Furthermore, Ind. Ann. Stat. Code § 8-21-4-6 (Burns 1973) provides that any torts committed while in flight in Indiana shall be governed by the laws of Indiana. Under the mandate of these statutes, the District Court quite properly looked to the law of Indiana to determine if Allegheny or the United States could state a claim for contribution and indemnity arising out of this particular aircraft accident.

Indiana has long followed the common law rule that there is no right to contribution or indemnity among joint tortfeasors. An exhaustive analysis of the Indiana law of indemnity and contribution is stated in *McClish* v. *Niagara Machine & Tool Works,* 266 F.Supp. 987 (S.D. Ind. 1967) wherein the District Court held that Indiana follows the

general rule that there can be no contribution or indemnity as between joint tortfeasors.

The decision of the Court of Appeals is totally contrary to the general common law rule denying contribution and indemnity among joint tortfeasors as applied in Indiana. The Court instead has fashioned a federal rule of contribution based on comparative negligence. This new federal rule is unsupported by any statutory or decisional authority.

This Court should grant review in order to restore the *Erie* doctrine in the Seventh Circuit and to implement the intent of Congress expressed in the Federal Tort Claims Act and the Federal Aviation Act.

CONCLUSION

For the foregoing reasons, the Joint Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A
OPINION OF THE COURT OF APPEALS

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 73-1392 and 73-1393
JILL MARY KOHR, Executrix of the Estate of Robert H. Kohr, Deceased,
Plaintiff-Appellee,
vs.
ALLEGHENY AIRLINES, INC. and UNITED STATES OF AMERICA,
Defendants-Appellants,
vs.
FORTH CORPORATION, BROOKSIDE CORPORATION, and LEE LEMAY, Administrator of the Estate of Robert W. Carey, Deceased,
Third-Party Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division — No. IP 69 C 431
CALE J. HOLDER,
Judge.

ARGUED FEBRUARY 14, 1974 — DECIDED SEPTEMBER 20, 1974

Before SWYGERT, *Chief Judge,* KILEY, *Senior Circuit Judge,*[1] and HOFFMAN, *Senior District Judge.*[2]

SWYGERT, *Chief Judge.* Defendants-appellants Allegheny Airlines, Inc. and the United States, appeal from the dismissal of their cross-claims and third-party complaints for indemnity and contribution against defendants-appellees

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[1] Judge Kiley heard oral argument in these appeals, but he died on September 6, 1974 before he considered this opinion.

[2] Senior Judge Julius J. Hoffman of the United States District Court for the Northern District of Illinois is sitting by designation.

Brookside Corporation (Brookside), Forth Corporation (Forth is a wholly-owned subsidiary of Brookside), and the estate of Robert W. Carey, The instant actions arise out of a mid-air collision on September 9, 1969, in the airspace over Fairland, Indiana between an Allegheny Airlines DC-9-31 jet aircraft and a Piper Cherokee aircraft piloted by Robert W. Carey and owned by Forth. The events surrounding the collision are set out in detail in the companion case tc this action, *Allegheny Airlines, Inc. and GECC Leasing Corp.* v. *United States of America et al.*, No. 73-1273 (7th Cir. Sept. 16, 1974), and need only be briefly recounted here.

The Allegheny aircraft was operated as Flight No. 853 en route from Cincinnati, Ohio to Indianapolis, Indiana. At the time of the collision Flight No. 853 was flying under an instrument flight rules clearance from Cincinnati to Indianapolis and was receiving and adhering to air traffic control radar directions from an air traffic controller employed by the Federal Aviation Administration at the Indianapolis Approach Control facility located at Indianapolis' Weir Cook Airport. The Piper Cherokee aircraft was operated by Carey, a student pilot, under visual flight rules. At the time of the collision Carey was engaged in a solo cross-country flight from Brookside Airport, McCordsville, Indiana to Bakalar Air Force Base, Columbus, Indiana. As a result of the mid-air collision both aircraft were totally destroyed and all eighty-three occupants were killed.

Subsequent to the accident, wrongful death actions were commenced on behalf of the estates of all the deceased passengers save one, the estates of three of the four Allegheny crew members, and the estate of Robert W. Carey. In addition, property damages suits were initiated to recover for the destruction of the two aircraft. All of these suits were commenced in various federal district courts on the basis of diversity of citizenship as to defendants Allegheny, Brookside, Forth, and the estate of Carey, and the Federal Tort Claims Act as to the defendant United States. The Judicial Panel on Multidistrict Litigation assumed jurisdiction over the various actions commenced outside of Indiana and pursuant to 28 U.S.C. § 1407

transferred them to the United States District Court for the Southern District of Indiana for the purpose of supervision of the pre-trial discovery. *In re Mid-Air Collision Near Fairland, Indiana,* 309 F.Supp. 621 (JPML 1970). Subsequent to the section 1407 transfer, the district court judge issued orders pursuant to 28 U.S.C. § 1404 transferring cases from respective transferor forums to the United States District Court for the Southern District of Indiana and consolidated those cases with other companion cases that had been initially commenced in the Indiana district court. By the time of trial Allegheny and the United States had filed cross-claims and third-party complaints against Brookside, Forth, and the estate of Carey seeking indemnity and contribution.

The first group of passenger cases was assigned to trial on February 22, 1972. The district judge severed all cross-claims and third-party complaints between the parties and deferred resolution of those issues until a future date. After the commencement of the February trial which involved as defendants Allegheny, the United States, Brookside, Forth, and the estate of Carey, an agreement was arrived at between the United States and the liability insurers of Allegheny for a pro-rata formula to be utilized between them in disposing of all cases, whether by settlement or judgment. The defendants Forth, Brookside, and estate of Carey were not parties to, and did not contribute anything to or under the agreement. Thereafter, on motion of plaintiffs and defendants Allegheny and the United States, the first group of passenger cases on trial were terminated and all claims, cross-claims, and third-party complaints were dismissed without prejudice pending a hearing on the reasonableness of the compromise. The district court found the compromise to be reasonable and accordingly Allegheny's insurers and the United States proceeded to settle the remaining passenger cases.

On December 5, 1972 the district court entered an order dismissing all actions including the plaintiffs' complaints as well as defendants' cross-claims, third-party complaints, and counterclaims. All such claims were to be dismissed with prejudice as of January 5, 1973. Both Allegheny and

the United States moved to vacate the December 5 entry objecting to the dismissal with prejudice of their claims over for indemnity and contribution against Forth, Brookside, and the estate of Carey. At a hearing on January 5, 1973 the district judge vacated its prior order of December 5, 1972 and directed that the plaintiffs' actions were to be dismissed without prejudice. At the same time the district judge allowed defendants Forth, Brookside, and the estate of Carey to file additional paragraphs of their answer pleading the defenses of res judicata, collateral estoppel, voluntary payment, accord and satisfaction, and failure to state a claim for relief in that no right to indemnity and contribution existed under Indiana law.

Thereafter, the court proceeded to grant the motions of Forth, Brookside, and the estate of Carey to dismiss the claims by Allegheny and the United States for indemnity and contribution by virtue of the application of Indiana law. In addition, the court granted summary judgment to Brookside, Forth, and the estate of Carey on the basis of the affirmative defenses of voluntary payment and accord and satisfaction in that the memorandum of agreement between Allegheny's liability insurers and the United States and the settlement of actions pursuant thereto constituted voluntary payments and accords and satisfactions. The court also granted summary judgment to Brookside on the separate defenses of res judicata and collateral estoppel as a result of the judgment entered in *Allegheny Airlines, Inc. and GECC Leasing Corp.* v. *United States of America, et al.*, in which it had been previously held that Brookside Corporation was not responsible for the torts committed by its wholly-owned subsidiary Forth Corporation.

I

Allegheny and the United States raise various issues in an appeal, to which we address the following: (1) whether the district court erred in dismissing the cross-claims and third-party complaints for indemnity and contribution for failure to state claims upon which relief may be granted; (2) whether the district court correctly granted summary judgment to Brookside on the basis of res judicata and collateral estoppel; (3) whether the district court properly

entered summary judgment on the basis that settlement of plaintiffs' claims by Allegheny and the United States constituted voluntary payment which barred any claims by Allegheny and the United States against the defendants; (4) whether the district court erred in granting summary judgment to Forth, Brookside, and the estate of Carey on the ground that the agreement between Allegheny's liability insurers and the United States constituted an accord and satisfaction thereby barring any claim for indemnity and contribution; and (5) whether the district court erred in entering an order dismissing all plaintiffs' claims without prejudice.

In view of our decision in the companion case of *Allegheny Airlines, Inc. and GECC Leasing Corp.* v. *United States of America, et al.*, No. 73-1273 (7th Cir. Sept. 16, 1974), Allegheny and the United States are precluded on the basis of the doctrines of res judicata and collateral estoppel from further pursuit of their claims for contribution and indemnity from the defendant Brookside. Accordingly, we affirm the district court on that issue. With respect to the remaining issues, however, we reverse and remand to the district court for trial.

II

Allegheny contends that it was error for the district court to dismiss its cross-claims and third-party complaints for indemnity and contribution. The district court held that Indiana law was controlling on these claims and that under Indiana law there could be no contribution and indemnity under that state's law. Allegheny urges that a federal rule of contribution and indemnity should govern in the instant action. Failing the application of a federal law of contribution Allegheny contends that in view of the multiplicity of state jurisdictions involved, with the various plaintiffs instituting actions in numerous states other than Indiana, the trial judge should have conducted an evidentiary hearing to facilitate a proper choice of law analysis. Had the district judge done so, it is claimed that jurisdictions other than Indiana would be found to have a more substantial interest in having their laws on contribution and indemnity applied. In addition, Allegheny contends that even assum-

ing Indiana law controls, the district court misapplied the rules on contribution and indemnity.

Were it necessary, we would be inclined to agree with Allegheny that the district judge failed to engage in an adequate conflict of law analysis and that he erred on the application for Indiana law on contribution and indemnity. We need not reach these issues, however, for we agree with Allegheny that there should be a federal law of contribution and indemnity governing mid-air collisions such as the one here.

III

The basis for imposing a federal law of contribution and indemnity is what we perceive to be the predominant, indeed almost exclusive, interest of the federal government in regulating the affairs of the nation's airways. Moreover, the imposition of a federal rule of contribution and indemnity serves a second purpose of eliminating inconsistency of result in similar collision occurrences as well as within the same occurrence due to the application of differing state laws on contribution and indemnity. Given the prevailing federal interest in uniform air law regulation, we deem it desirable that a federal rule of contribution and indemnity be applied.

That the federal interest in regulating airways is predominant was long ago recognized by Justice Jackson in *Northwest Airlines* v. *Minnesota,* 322 U.S. 292, 303 (1944):

> Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons* v. *Ogden,* 9 Wheat. 1, to *United States* v. *Appalachian Power Co.,* 311 U.S. 377. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.
>
> Congress has recognized the national responsibility for regulating air commerce. Federal control is

> intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

With the passage of the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301, et seq., Congress expressed the view that the control of aviation should rest exclusively in the hands of the federal government. In section 1108 of the Act, 49 U.S.C. § 1508(a), it is clearly provided that:

> (a) The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.

The explicit objective of the Act is to foster the development of air commerce. 49 U.S.C. § 1346. To that end, it has been recognized that the principal purpose of the Act is to create one unified system of flight rules and to centralize in the Administrator of the Federal Aviation Administration the power to promulgate rules for the safe and efficient use of the country's airspace. *United States* v. *Christensen,* 419 F.2d 1401 (9th Cir. 1969); *Air Line Pilots Association* v. *Quesada,* 276 F.2d 892 (2d Cir. 1960). When

the notion of federal preemption over aviation is viewed in combination with the fact that this litigation ensues from a mid-air collision occurring in national airspace, that the Government is a party to the action pursuant to the Federal Tort Claims Act (28 U.S.C. §§ 1346(b), et seq.), and that this litigation has since its inception been subject to the supervision of the Judicial Panel created by the Multidistrict Litigation Act (28 U.S.C. §§ 1407, et seq.), there is no perceptible reason why federal law should not be applied to determine the rights and liabilities of the parties involved. The interest of the state wherein the fortuitous event of the collision occurred is slight as compared to the dominant federal interest. Accordingly, the rights and liabilities of Allegheny and the United States are peculiarly federal in nature and are to be governed by a federal rule of contribution and indemnity.[3]

IV

Having determined that a federal rule of contribution and indemnity among joint tort-feasors should control in aviation collisions, we reject as being outmoded and entirely unsatisfactory, the contention that the federal rule should be one of "no contribution." We agree that "[t]here is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered on to one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiffs' whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free." Prosser, Law of Torts, § 50 (4th ed. 1971).

In our judgment the better rule is that of contribution and indemnity on a comparative negligence basis. Under such an approach the trier of fact will determine on a per-

---

[3] In view of the aforementioned predominant federal interest in formulating a rule of contribution and indemnity we are of the view that the Federal Tort Claims Act is not an obstacle to the application of such a rule to the United State's claims. In addition we find no merit in defendants' argument that Allegheny and the United States are estopped to assert the invalidity of the dismissal of their cross-claims and third-party complaints.

centage basis the degree of negligent involvment of each party in the collision. The loss will then be distributed in proportion to the allocable concurring fault. In allocating the loss where as here that amount involves a settlement and not a judgment, the trier of fact must also establish what amount would be a reasonable settlement under the circumstances. On reaching such an amount each party contributes according to his degree of fault.

Allegheny and the United States contended that the district court improperly entered summary judgment against them with respect to defenses raised by the defendants claiming voluntary payment, and accord and satisfaction. Also it is contended by Allegheny and the United States that the district court erred in entering an order dismissing all plaintiffs' claims without prejudice.

As to the defense of voluntary payment, the defendants urge that the settlement of plaintiffs' claims by Allegheny and the United States constituted a voluntary payment which barred any claims by them against the defendants. We disagree for it is a well recognized policy that settlements are to be encouraged, and we have previously held that a voluntary settlement does not bar a subsequent suit for indemnity. *Chicago, Rock Island & Pacific Ry. Co.* v. *United States,* 220 F.2d 939, 941 (7th Cir. 1955). Moreover, we note that in applying the federal rule of contribution and indemnity the trier of fact is to make a determination as to what was a reasonable amount at which to settle. Such a determination would necessarily take into consideration the voluntary nature of the settlement.

We find to be without worth defendants' contention that the agreement between Allegheny's liability insurers and the United States constituted an accord and satisfaction thereby barring any claims for indemnity and contribution. There was no contract between Allegheny or the United States and the defendants. Moreover, it cannot be claimed that the defendants were the intended beneficiaries of any agreement between Allegheny and the United States.

Lastly, we agree with Allegheny and the United States that it was error for the district court to enter the order of January 5, 1973 dismissing all of the plaintiffs' complaints

without prejudice, the exact opposite of what the parties had agreed to in settlement. Under the circumstances it was an abuse of discretion for the district court to effectively change the settlement from one providing for dismissal of plaintiff's complaints with prejudice to one providing for the dismissal without prejudice.

Affirmed in part; reversed in part and remanded for a new trial pursuant to Circuit Rule 23.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

JUDGMENT OF THE COURT OF APPEALS

— Opinion by Judge Swygert —

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 20, 1974

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. ROGER J. KILEY, Senior Circuit Judge
Hon. JULIUS J. HOFFMAN, Senior District Judge*

JILL MARY KOHR, etc.,
Plaintiff-Appellee,
vs.
ALLEGHENY AIRLINES, INC., et al.,
Defendants-Appellants,
No. 73-1392, 73-1393
vs.
FORTH CORPORATION, et al.,
Third Party Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana.
Indianapolis Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

---

* Senior Judge Julius J. Hoffman of the United States District Court for the Northern District of Illinois is sitting by designation.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part, REVERSED in part and this cause be and the same is hereby REMANDED to the said District Court for a new trial pursuant to Circuit Rule 23, in accordance with the opinion of this Court filed this day.

APPENDIX C

DENIAL OF PETITION FOR REHEARING

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

November 26, 1974.

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. JULIUS J. HOFFMAN, Sr. District Judge

JILL MARY KOHR, EXECUTIVE OF THE ESTATE OF ROBERT H. KOHR, Deceased, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Southern District of Indiana.
No. 73-1392, 73-1393 vs.	
ALLEGHENY AIRLINES, INC., UNITED STATES OF AMERICA, *Defendants-Appellants.*	Indianapolis Division (IP 69 C 431)

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above-entitled cause, a vote of the active members of the Court was requested, and a majority of the active members of the Court having voted to deny a rehearing *en banc,*

IT IS ORDERED that the petition for rehearing and the suggestion that it be heard *en banc* be, and the same are hereby, DENIED.

Judge Cummings, Stevens and Tone voted to grant said petition for rehearing *en banc.*

APPENDIX D
STATUTES INVOLVED

Federal Statutes

28 U.S.C. § 1346(b).

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

49 U.S.C. § 1506

Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. § 1508(a)

(a) The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.

State Statutes

Ind. Ann. Stat. Code § 8-21-4-5 (Burns 1973)

The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damages caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

Ind. Ann. Stat. Code § 8-21-4-6 (Burns 1973)

All crimes, torts and other wrongs committed by or against an aeronaut or passenger while in flight over this state shall be governed by the laws of this state; and the question whether damage occasioned by or to an aircraft while in flight over this state constitute a tort, crime or other wrong by or against the owner of such aircraft, shall be determined by the laws of this state.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—1060

FORTH CORPORATION and LEE LEMAY, Administrator of the Estate of Robert W. Carey, Deceased,

Petitioners,

v.

ALLEGHENY AIRLINES, INC. and UNITED STATES OF AMERICA,

Respondents.

BRIEF OF RESPONDENT ALLEGHENY AIRLINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—1060

FORTH CORPORATION and LEE LEMAY, Administrator of the Estate of Robert W. Carey, Deceased,

Petitioners,

v.

ALLEGHENY AIRLINES, INC. and UNITED STATES OF AMERICA,

Respondents,

BRIEF OF RESPONDENT ALLEGHENY AIRLINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent Allegheny Airlines, Inc., submits this brief in opposition to the petition filed by petitioners for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Citations to Opinions Below

The opinion of the Court of Appeals (Petition, Appendix A) is reported at 504 F. 2d 400. The decision by the Court of Appeals denying the petitioners' request for a rehearing *en banc* is contained in Appendix C of the petition.

Jurisdiction

The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals correctly hold that the District Court was in error in dismissing under Rule 12(b)(6), Fed. R. Civ. P., respondents' cross-claims and third-party complaints for indemnity and/or contribution for failure to state a claim upon which relief can be granted?

Statutes Involved

Those statutes that may be involved herein are set forth in Appendix D of the petition.

Statement

This case arises out of a mid-air collision which occurred on September 9, 1969, in the airspace over Fairland, Indiana, between an Allegheny Airlines DC-9 jet aircraft and a Piper Cherokee aircraft being flown by Robert Carey. The Piper Cherokee was owned by Forth Corporation, a wholly owned subsidiary of Brookside Corporation. All occupants of both aircraft were killed in the accident.

The Allegheny aircraft was operated as Flight No. 853 en route from Cincinnati, Ohio, to Indianapolis, Indiana. At the time of the collision Flight No. 853 was flying under an instrument flight rules clearance from Cincinnati to Indianapolis and was receiving and adhering to air traffic control radar direction from an air traffic controller employed by the Federal Aviation Administration at the Indianapolis Approach Control facility located at Indianapolis Weir Cook Airport. The Piper Cherokee Aircraft was operated by Carey, a student pilot, under visual flight rules. At the time of the collision Carey was engaged in a solo cross-country flight from Brookside Airport, McCordsville, Indiana, to Bakalar Air Force Base, Columbus, Indiana. As a result of the mid-air collision

both aircraft were totally destroyed and all eighty-three occupants were killed.

Subsequent to the accident, wrongful death actions were commenced on behalf of the estates of all the deceased passengers save one, the estates of three of the four Allegheny crew members, and the estate of Robert W. Carey. In addition, property damage suits were initiated to recover for the destruction of the two aircraft. All of these suits were commenced in various federal district courts on the basis of diversity of citizenship as to defendants Allegheny, Brookside, Forth and the estate of Carey, and the Federal Tort Claims Act as to the defendant United States. The Judicial Panel on Multidistrict Litigation assumed jurisdiction over the various actions commenced outside of Indiana and pursuant to 28 U.S.C. § 1407 transferred them to the United States District Court for the Southern District of Indiana for the purpose of supervision of the pretrial discovery. *In re Mid-Air Collision Near Fairland, Indiana*, 309 F. Supp. 621 (JPML 1970). Subsequent to the section 1407 transfer, the District Court judge issued orders pursuant to 28 U.S.C. § 1404 transferring cases from respective transferor forums to the United States District Court for the Southern District of Indiana and consolidated those cases with other companion cases that had been initially commenced in the Indiana District Court. By the time of trial Allegheny and the United States had filed cross-claims and third-party complaints against Brookside, Forth and the estate of Carey seeking indemnity and contribution.

The first group of passenger cases was assigned to trial on February 22, 1972. The district judge severed all cross-claims and third-party complaints between the parties and deferred resolution of those issues until a future date. After the commencement of the February trial which involved as defendants Allegheny, the United States, Brookside, Forth and the estate of Carey, an agree-

ment was arrived at between the United States and the liability insurers of Allegheny for a pro-rata formula to be utilized between them in disposing of all cases, whether by settlement or judgment. The defendants Forth, Brookside and the estate of Carey were not parties to and did not contribute anything to or under the agreement. Thereafter, on motion of plaintiffs and defendants Allegheny and the United States, the first group of passenger cases on trial were terminated and all claims, cross-claims and third-party complaints were dismissed without prejudice pending a hearing on the reasonableness of the compromise. The District Court found the compromise to be reasonable and accordingly Allegheny's insurers and the United States proceeded to settle the remaining passenger cases.

On December 5, 1972, the District Court entered an order dismissing all actions including the plaintiffs' complaints as well as defendants' cross-claims, third-party complaints and counterclaims. All such claims were to be dismissed with prejudice as of January 5, 1973. Both Allegheny and the United States moved to vacate the December 5 entry objecting to the dismissal with prejudice of their claims over for indemnity and contribution against Forth, Brookside and the estate of Carey. At a hearing on January 5, 1973, the district judge vacated its prior order of December 5, 1972, and directed that the plaintiffs' actions were to be dismissed without prejudice. At the same time the district judge allowed defendants Forth, Brookside and the estate of Carey to file additional paragraphs of their answer pleading the defenses of *res judicata,* collateral estoppel, voluntary payment, accord and satisfaction, and failure to state a claim for relief in that no right to indemnity and contribution existed under Indiana law.

Thereafter, the Court proceeded to grant the motions of Forth, Brookside and the estate of Carey to dismiss the claims by Allegheny and the United States for indemnity

and contribution by virtue of the application of Indiana law. In addition, the Court granted summary judgment to Brookside, Forth and the estate of Carey on the basis of the affirmative defenses of voluntary payment and accord and satisfaction in that the memorandum of agreement between Allegheny's liability insurers and the United States and the settlement of actions pursuant thereto constituted voluntary payments and accords and satisfactions. The Court also granted summary judgment to Brookside on the separate defenses of *res judicata* and collateral estoppel as a result of the judgment entered in *Allegheny Airlines, Inc. and GECC Leasing Corp.* v. *United States of America, et al.*, 504 F. 2d 104 (7th Cir. 1974), in which it had been previously held that Brookside Corporation was not responsible for the torts committed by its wholly owned subsidiary Forth Corporation. The judgment entered applied to all cases.

Allegheny Airlines and the United States then appealed to the Court of Appeals on the grounds: (1) whether the District Court erred in dismissing the cross-claims and third-party complaints for indemnity and contribution for failure to state claims upon which relief may be granted; (2) whether the District Court correctly granted summary judgment to Brookside on the basis of *res judicata* and collateral estoppel; (3) whether the District Court properly entered summary judgment on the basis that settlement of plaintiffs' claims by Allegheny and the United States constituted voluntary payment which barred any claims by Allegheny and the United States against the defendants; (4) whether the District Court erred in granting summary judgment to Forth, Brookside and the estate of Carey on the ground that the agreement between Allegheny's liability insurers and the United States constituted an accord and satisfaction thereby barring any claim for indemnity and contribution; and (5) whether the District Court erred in entering an order dismissing all plaintiffs' claims without prejudice.

On September 20, 1974, the United States Court of Appeals for the Seventh Circuit issued its opinion (Appendix A of the Petition) in which it affirmed the District Court with respect to the judgment entered in favor of Brookside, and reversed the judgment in favor of Forth and LeMay holding that a claim for relief as to indemnity and contribution existed, that the settlements made by Allegheny's insurers and the United States did not bar their respective claims for indemnity and contribution, and that it was error for the District Court to have ignored the terms of the settlements and dismiss the deceased passengers' cases without prejudice when the settlement agreements called for dismissal with prejudice. A new trial was ordered with respect to the indemnity and contribution claims.

Forth and LeMay then petitioned the Court of Appeals for a rehearing *en banc,* and on November 26, 1974, said petition was denied by a vote of five to three. The instant petition for certiorari was filed herein on February 24, 1975.

Argument

The petition for writ of certiorari should be denied because the petitioners seek review of a non-final order remanding the case to the District Court for a trial on the merits, and the decision below is correct in light of the current law and developing jurisprudence and not in conflict with the decisions of any other Courts of Appeals.

POINT I.

Since the case has been remanded for a trial on the merits, it does not warrant review at this time.

The Court of Appeals remanded this case to the District Court for a trial on the merits to determine whether Al-

legheny Airlines and/or the United States was entitled to indemnity and contribution from Forth and/or LeMay. This type of non-final order should not be reviewed by this Court at this time. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U. S. 327, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 257-258, 36 S. Ct. 269, 60 L. Ed. 629 (1916).

It is hornbook law that a pleading should not be dismissed for failure to state a claim for relief unless it appears beyond doubt that the claimant can prove no set of facts in support thereof which would entitle him to relief. *Conley* v. *Gibson*, 355 U. S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Austin* v. *House of Vision, Inc.*, 385 F. 2d 171 (7th Cir. 1967); *Jung* v. *K. & D. Mining Co.*, 260 F. 2d 607 (7th Cir. 1958). This rule is equally applicable to cross-claims and third-party complaints for indemnity and/or contribution. *Gentry* v. *Wilmington Trust Co.*, 321 F. Supp. 1379 (D. Del. 1970); *Yanick* v. *Pennsylvania Railroad Co.*, 192 F. Supp. 368 (E.D.N.Y. 1961).

As is stated in Wright & Miller, *Federal Practice and Procedure*, Civil § 1363:

> "A motion to dismiss for failure to state a claim for relief under Rule 12(b)(6) goes to the sufficiency of the pleading under Rule 8(a)(2). Typically, the only information necessary for a decision on the motion is to be found in the pleading itself; if outside evidence is considered, the motion becomes one for summary judgment. Because of the nature of the objection presented by this motion, namely that the allegations in the pleading do not state a valid claim for relief, and the historical background of this motion, it being the modern counterpart to the demurrer and the code motion to dismiss, the courts have held that all of the allegations of the pleading are to be construed in the light most favorable to the pleader and accepted as true." Vol. 5, page 656.

It would therefore appear that once a court determines from a review of the pleading that it is possible that Allegheny Airlines could have a valid claim for indemnity and/or contribution under the law of some jurisdiction, the motion to dismiss under Rule 12(b)(6) should be denied. *Banks* v. *King Features Syndicate,* 30 F. Supp. 352 (S.D.N.Y. 1939). Thereafter, the actual validity of the claims must be based upon a *factual* determination of which jurisdiction has the most substantial interest in this particular issue.[1]

This factual determination may be resolved by a preliminary hearing as authorized by Rule 12(d), *Armstrong* v. *Udall,* 435 F. 2d 38 (9th Cir. 1970), cf. *National Hollow Brake Beam Co.* v. *Chicago Ry. Equipment Co.,* 168 Fed. 666 (7th Cir. 1909); or by summary judgment, *Kantlehner* v. *United States,* 279 F. Supp. 122 (E.D.N.Y. 1967), *Harris* v. *Pate,* 440 F. 2d 315 (7th Cir. 1971); or after a trial on the merits. *Emmert* v. *United States,* 300 F. Supp. 45 (D.C. 1969); *Chicago & N.W. R. Co.* v. *Chicago Packaged Fuel Co.,* 183 F. 2d 630 (7th Cir. 1950). None of these approaches was followed by the District Court.

As the Court of Appeals held in *Brown* v. *Quinlan,* 138 F. 2d 228 (7th Cir. 1943):

> "* * * To effect an involuntary termination of a suit requires, in the absence of waiver of final hearing, a hearing upon a motion for summary judgment or to dismiss the complaint. No such hearing was had. The complaint on its face was sufficient and it was error, therefore, finally to dispose of the cause without final hearing." 138 F. 2d at 229.

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[1] Indiana applies the law of the jurisdiction with the most substantial interest in the particular issue to be resolved. *Watts* v. *Pioneer Corn Co.,* 342 F. 2d 617 (7th Cir. 1965); *Motteler* v. *J. A. Jones Const. Co.,* 457 F. 2d 920 (7th Cir. 1972); *Witherspoon* v. *Salm,* 142 Ind. App. 655, 670, 237 N.E. 2d 116, rev'd on other grounds 243 N.E. 2d 876 (1968).

At any such hearing, the parties must be given an opportunity to present evidence and the Court must make findings of fact. *Marra* v. *Bushee*, 447 F. 2d 1282 (2d Cir. 1971); *King* v. *Wall & Beaver Street Corp.*, 145 F. 2d 377, 380-1 (D.C. Cir. 1944); cf. *Chance* v. *E. I. DuPont de Nemours & Co.*, 57 F.R.D. 165 (E.D.N.Y. 1972).

Since the District Court held no evidentiary hearing as to choice-of-law, the Court of Appeals was correct in reversing the judgment below and ordering a trial on the merits.[2]

POINT II.

The decision to apply federal law was correct and not in conflict with any other decisions by Courts of Appeals.

In remanding the case to the District Court for trial on the merits, the Court of Appeals stated that because of the particular facts in this accident federal law on indemnity and contribution should be applied. The correctness of this interpretation must be governed by the facts of this particular accident.

Most of the cases herein were in the United States District Court for the Southern District of Indiana pursuant to 28 U.S.C.A. § 1404 transfers issued by Judge Cale J. Holder as transferee judge under 28 U.S.C.A. § 1407.[3] As the transfer orders indicate, cases were transferred to Indiana from New York, New Jersey, Connecticut, Mis-

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[2] The Court of Appeals in its opinion also stated: "Were it necessary, we would be inclined to agree with Allegheny that the district judge failed to engage in an adequate conflict of law analysis and that he erred on the application of Indiana law on contribution and indemnity." Petition, Appendix A, page A6.

[3] The power of a § 1407 transferee judge to transfer cases to himself under 28 U.S.C.A. § 1404 was upheld in *Pfizer* v. *Lord*, 447 F. 2d 122 (2d Cir. 1971).

souri, Illinois, Ohio, Kentucky, Tennessee, Virginia and West Virginia.

Pursuant to this Court's decision in *Van Dusen* v. *Barrack*, 376 U. S. 612, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964), the District Court in all cases transferred to it under 28 U.S.C.A. § 1404 was required to decide the issues as though it were the transferor court. *Kline* v. *Wheels by Kinney, Inc.*, 464 F. 2d 184, 185 (4th Cir. 1972); *Glick* v. *White Motor Co.*, 458 F. 2d 1287, 1293 (3rd Cir. 1972); *Bott* v. *American Hydrocarbon Corp.*, 441 F. 2d 896, 899 (5th Cir. 1971). The transferee court was required to apply the substantive law of the transferor court, *In re Plumbing Fixtures*, 342 F. Supp. 756 (JPML 1972), including its conflict-of-laws rule. *Klaxon* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941); *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851, 858 (2d Cir. 1965). The District Court was required, therefore, to determine whether or not valid claims for indemnity and/or contribution were stated exactly as New York, New Jersey, Connecticut, Missouri, Illinois, Ohio, Kentucky, Tennessee, Virginia and West Virginia transferor courts would have decided the issue.

In addition to the issue as to which law transferor courts would apply, there existed a number of the usual forum selection units which may well have justified the selection of another jurisdiction's law. For example, the *Moore* case involved a Missouri resident suing in Illinois; *Alexander* involved a New York resident suing in Indiana; *Buchenberg* involved a Maryland resident suing in Illinois; *Conover* involved a Connecticut resident, domiciled in Massachusetts at the time the cause of action arose, suing in Connecticut; *Morgan* involved a Pennsylvania resident suing in Indiana; *Morgan, deceased Anderson* involved a North Carolina resident suing in Indiana; *Kirschbraun* involved a Texas resident suing in Indiana; *Smith* involved a California resident suing in Indiana; *Jagger, deceased*

Powers involved a Colorado resident suing in Indiana; *Gillispie* involved a Virginia resident suing in Illinois; *Martinson* involved a Tennessee resident suing in Illinois; *Kulinski* involved an Indiana resident suing in Illinois; *Bays* involved an Ohio resident suing in Illinois; *Fields* involved a Kentucky resident suing in Ohio; *Wientjes* involved an Illinois resident suing in Ohio; and *Whaley, deceased Picton-Warlow* involved an Australian decedent traveling in International transportation subject to the Warsaw Convention at the time of his death, the administrator of whose estate commenced suit in Indiana.

Furthermore, in all of the jurisdictions wherein the present cases originated, the public policy of the forum, whether by statute or judicial decision, was to favor contribution and/or indemnity. As the District Court observed in *Kantlehner, supra*:

> "The forum state always has some interest in the application of its own law . . ." 279 F. Supp. at 127.

Indeed, Professor Ehrenzweig has preferred to think of restitution (which includes indemnity and contribution) as primarily a matter of remedy, to which a forum court should feel free to apply its own rules of law:

> "Once a tortfeasor has made good on the loss caused by him, he will, under the common law, not be permitted to seek recoupment from another tortfeasor. Originally this rule was justified on the ground that the law will not aid a wrongdoer. But this rationale has lost all meaning with regard to enterprise liability for negligence without fault. Although the rule today will usually be rationalized therefore against the background of this enterprise liability on the ground that redistribution of an accidental loss once distributed will not be favored, this rule has in many jurisdictions been superseded by statute. In conflicts cases of this kind, the forum has no reason for apply-

> ing a foreign law. Neither had the plaintiff relied on a contribution when he committed his tort, nor the defendant on freedom from ultimate liability when he himself engaged in his tortious act. In any event application of the law of the fortuitous place of accident is as uncalled for here as it is elsewhere." Ehrenzweig, *Restitution in the Conflict of Laws: Law and Reason versus the Restatement Second,* 36 N.Y. U. L. Rev. 1298, 1308-1309 (1961).

Since the Indiana rule (as interpreted by petitioners) of no-contribution among joint tortfeasors stems from the outmoded belief that Indiana courts will not trouble themselves with apportioning fault (*Cleveland, etc., R. Co.* v. *Hilligoss,* 171 Ind. 417, 86 N. E. 485 (1908)), it would appear that where the forum state does have a public policy in favor of contribution it should apply its own law and allow contribution. Wade, *Joint Tortfeasors and the Conflict of Laws,* 6 Vand. L. Rev. 464 (1953).

In addition, once recognition is made of the fact that claims for indemnity and contribution seek restitution and are based upon equitable considerations of unjust enrichment, then a significant factor in making a choice-of-law determination is knowledge as to where the settlement was consummated, where orders of compromise were entered, where releases were signed and where payments were made. *Wilson & Co.* v. *Douredoure,* 154 F. 2d 442, 444 (3rd Cir. 1946). As Professor Leflar points out in his treatise American Conflicts Law (1968):

> ". . . It might reasonably be argued, however, that the right to contribution or indemnity grows out of the payment by one tortfeasor of what the other tortfeasor should pay, so that the claim is one based on unjust enrichment, in the nature of quasi-contract, and therefore should be governed by the law of the place where the other tortfeasor's obligation was discharged by overpayment." § 142, pp. 349-350.

As to choice-of-law determination in quasi-contractual situations, Professor Leflar states:

> "There is no segment of the law in which it will be easier than in this for courts to deal with conflicts cases by frank reference to the relevant choice-influencing considerations. In neither law nor equity have mechanical rules been developed or accepted for restitution cases. * * * Nearly every type of quasi-contractual claim can be characterized as sounding also in some other familiar field of law, and few cases have for conflicts purposes been given a quasi-contracts characterization. Thus a right to contribution between tortfeasors, arising when one joint tortfeasor has discharged more than his proper share of the common liability, might be deemed to come into existence if at all at the place where the common liability was discharged by the claimant, but it has usually been called a torts problem so that the law of the place of tort, or whatever law the court applies to the tort claim, is held to govern. The problem in indemnity cases is substantially similar. * * *
>
> If restitution problems be analyzed in terms of the five summarized choice-influencing considerations, the conclusions to be arrived at will at least not be mechanical, and will be understandable. Predictability of results (A) will be important only if the transaction out of which the claim arose was undertaken in reliance upon some particular state's law, which will sometimes but not often be true. Maintenance of interstate orderliness (B) and simplification of the judicial task (C) will almost never be relevant in quasi-contracts cases. But the advancement of the forum's governmental interests (D) and the forum's preference for application of what it regards as the better rule of law (E), perhaps its own, can almost always enter into a restitution decision." American Conflicts Law, § 157, pp. 387-388.

Besides the public policy considerations of the forum state referred to above, other facts that the District Court would have to consider in making a choice-of-law decision are:

(1) The domiciles of the deceased passenger and his next of kin, including the interest of the jurisdiction exercising probate jurisdiction over the decedent's estate and the rights of creditors to the assets of that estate.

(2) The interest of the jurisdiction wherein the decedent purchased his ticket, where he boarded the aircraft, his destination, and whether the place of the accident was merely fortuitous.

(3) The interest of the state of incorporation and states wherein business is conducted by the defendants and third-party defendants.

(4) The interest of the jurisdiction wherein the various acts of negligence were committed, and, if different, the interest of the jurisdiction wherein the injury occurred.

(5) The interest of the jurisdiction where the relationship, if any, between the parties is centered.

(6) The extent to which any of the foregoing interests is rendered insignificant because of insurance coverage, and, if liability insurance exists, the nature and extent of coverage and the interests of the insured and insurer.

(7) The jurisdiction where the settlements were consummated, orders of compromise entered, releases signed,[4] and payments made.

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[4] See *Manos* v. *Trans World Airlines, Inc.*, 295 F. Supp. 1166 (E.D. Ill. 1968), for a choice-of-law analysis as to the effect of a release on the liability of a joint tortfeasor.

Restatement Second, *Conflict of Laws*, §§ 6, 145, 173, 221; *Goodrich, Conflict of Laws* §§ 92, 93 (4th Ed., Scoles, 1964).

Respondent Allegheny Airlines would submit that if the federal courts are to bind themselves to state choice-of-law theories in this type of multidistrict litigation, then the District Court must make a case-by-case analysis of all relevant facts in order to determine which law shall be applied. *Kantlehner* v. *United States*, 279 F. Supp. 122 (E.D.N.Y. 1967); *Emmert* v. *United States*, 300 F. Supp. 45 (D.C. 1969); *Madrin* v. *Wareham*, 344 F. Supp. 166 (W.D. Pa. 1972); *Ryer* v. *Harrisburg Kohl Brothers, Inc.*, 53 F.R.D. 404 (M.D. Pa. 1971). Such an analysis would lead, in respondent's opinion, to the rejection of Indiana law[5] and adoption of the law of either the transferor forum state or the state wherein the unjust enrichment occurred. It was therefore clear error for the District Court to apply the law of Indiana.

In comparison with this laborious approach to the problem, the Court of Appeals recognized that this was an ideal case for the application of federal law, rather than state law. As Mr. Justice Douglas recently pointed out in *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972):

> "When we deal with air and water in their ambient or interstate aspects, there is a federal common law . . ." 406 U. S. at 103.

Indeed, how can there be anything else but a federal common law governing the rights and liabilities arising out of a mid-air collision when Congress has unequivocally declared:

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[5] In *Bennett* v. *Macy*, 324 F. Supp. 409 (W.D. Ky. 1971), the Court rejected the application of Indiana law to an Indiana accident which would have benefited an Indiana resident. Accord, *Gross* v. *McDonald*, 354 F. Supp. 378 (E.D. Pa. 1973).

> "The United States of America is hereby declared to possess and exercise complete and exclusive sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction." 72 Stat. 798, 49 U. S. C. A. § 1508(a).

Federalization of air commerce and of the rights and liabilities of persons engaged therein has been recognized and sanctioned by the Supreme Court and other federal courts on numerous occasions. *City of Burbank* v. *Lockheed Air Terminal*, 411 U. S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973); *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 303, 64 S. Ct. 950, 88 L. Ed. 1283 (1944); *United States* v. *City of New Haven*, 447 F. 2d 972 (2d Cir. 1971); *Archibald* v. *Pan American World Airways, Inc.*, 460 F. 2d 14 (9th Cir. 1972); *Fitzgerald* v. *Pan American World Airways, Inc.*, 229 F. 2d 499 (2d Cir. 1956); *Gabel* v. *Hughes Air Corp.*, 350 F. Supp. 612 (C. D. Calif. 1972); *Lulo* v. *Saturn Airways, Inc.*, no off. rep., 12 C. C. H. Avi. 17,953 (S. D. N. Y. 1973); *Wills* v. *Trans World Airlines, Inc.*, 200 F. Supp. 360 (S. D. Calif. 1961); *Mortimer* v. *Delta Air Lines*, 302 F. Supp. 276 (N. D. Ill. 1969); *Doe* v. *Civil Aeronautics Board*, 356 F. 2d 699, 701 (10th Cir. 1966); *United States* v. *Christensen*, 419 F. 2d 1401 (9th Cir. 1969); *Air Line Pilots Association* v. *Quesada*, 276 F. 2d 892 (2d Cir. 1960); *Air Line Pilots Association* v. *Federal Aviation Administration*, 454 F. 2d 1052 (D. C. Cir. 1971); *American Airlines, Inc.* v. *City of Audubon Park, Kentucky*, 297 F. Supp. 207 (W. D. Ky. 1968), aff'd 407 F. 2d 1306 (6th Cir. 1969).

It is clear that where there is a predominantly federal interest involved or where federal uniformity is required, the courts develop a federal common law to govern the

situation. Note, *Toward a Workable Rule of Contribution in the Federal Courts,* 65 Col. L. Rev. 123 (1965); *Illinois* v. *City of Milwaukee, supra; Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398, 421-427, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964); *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 456-7, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957); *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 63 S. Ct. 573, 87 L. Ed. 838 (1943); *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.,* 315 U. S. 447, 455-6, 62 S. Ct. 676, 86 L. Ed. 956 (1942); *Kansas* v. *Colorado,* 206 U. S. 46, 98, 27 S. Ct. 655, 51 L. Ed. 956 (1907); Wright, The Law of Federal Courts, § 60 (2d Ed. 1970).

Since in the instant action Allegheny Airlines, as a certificated common carrier by air, was operating its Flight 853 in interstate commerce in the national airspace pursuant to the direction, instruction and control of the Federal Aviation Administration, the rights and liabilities arising out of this mid-air collision are peculiarly federal in nature and should be governed by federal law.[6] Haller, *Death in the Air: Federal Regulation of Tort Liability a Must,* 54 A.B.A.J. 382 (1968); Note, *Conflict of Laws—Desirability of Federal Legislation in Commercial Aviation,* 18 Vand. L. Rev. 1632 (1965).

The Federal Tort Claims Act presented no obstacle to such a result since, pursuant to its provisions, the liability of the United States is to be determined ". . . in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346 (b). Assuming the Government's negligent act occurred in Indiana, then the entire law of Indiana, including its conflict-of-laws rules, must be applied. *Richards* v. *United States,* 369 U. S. 1, 82 S. Ct.

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[6] See 3 Moore, Federal Practice ¶ 14.29 (2d Ed. 1963), wherein he states: ". . . the common law rule of no-contribution is outmoded, unsatisfactory, and is yielding to the more equitable rule of contribution; . . . here is a situation for a touch of creativeness" (p. 768).

585, 7 L. Ed. 2d 492 (1962). Since Indiana applies the law of the jurisdiction with the most substantial interest in the controversy (see footnote 1, *supra*), it was perfectly proper for the Court of Appeals to conclude that federal interests were predominant and federal law should be applied.[7]

Once this decision was made, it was only logical for the Court of Appeals to rule that the issues of indemnity and contribution should be decided on the basis of comparative negligence. Certainly, this Court has always shown a preference for comparative negligence in indemnity actions, *United States* v. *Seckinger*, 397 U. S. 203, 90 S. Ct. 880, 25 L. Ed. 2d 224 (1969); cf. *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, —— U. S. ——, 94 S. Ct. 2174, 42 Law Week 4795, fn. 3 (May 28, 1974), and *United States* v. *Reliable Transfer Co.*, 497 F. 2d 1036 (2d Cir. 1974), cert. granted No. 74-363, and the States are moving in the same direction as evidenced by the growing acceptance of the doctrine of comparative negligence and the widely heralded decision by the New York Court of Appeals in *Dole* v. *Dow Chemical Co.*, 30 N.Y. 2d 143, 282 N.E. 2d 288 (1972), which mandated the application of comparative negligence in indemnity actions. Cf. *Hurdich* v. *Eastmount Shipping Co.*, 503 F. 2d 397 (2d Cir. 1974).

Based upon the foregoing, respondent Allegheny Airlines, Inc., submits that the decision by the Court of Appeals herein was correct and not in conflict with the decisions of any other Courts of Appeals.

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[7] Professor Moore for years has advocated that there should be one uniform federal law of indemnity where the United States is a party to the litigation. 3 Moore's Federal Practice ¶ 14.29.

CONCLUSION

The petition for a writ of certiorari should be denied.

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